Supreme Court U.S.
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No. 97-138

In The

Supreme Court of the United States

October Term, 1996

JEANNE ELLIS,

Petitioner,

vs.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Transamerica Occidental Life Insurance Company is a wholly owned subsidiary of Transamerica Insurance Corporation of California, which in turn is a wholly owned subsidiary of Transamerica Corporation, a publicly traded Delaware corporation.

There are four wholly owned subsidiaries of Transamerica Occidental Life Insurance Company, including First Transamerica Life Insurance Company, Transamerica Life Insurance and Annuity Company, Transamerica Life Insurance Company of Canada, and NEF Investment Company. There are no nonwholly owned subsidiaries of Transamerica Occidental Life Insurance Company.

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STATEMENT OF THE CASE

Petitioner Jeanne Ellis ("Ellis") filed the within action to recover benefits allegedly owed under an employee welfare benefit plan governed by 29 U.S.C. §§ 1001, *et seq.*, the Employee Retirement Income Security Act of 1974 ("ERISA"). Ellis claims entitlement to accidental death benefits of $275,000 arising from the death of the employee, her late husband Paul Ellis ("Mr. Ellis").

The accidental death coverage of the plan was underwritten by respondent Transamerica Occidental Life Insurance Company ("Transamerica"). As indicated in Ellis's Appendix at 18 ("App. 18"), the policy provided benefits only for:

> specified loss resulting directly and independently of all other causes from bodily injuries caused by accident occurring while this policy is in force.[1]

The policy excluded:

> loss caused by or resulting from illness, disease, bodily infirmity or any bacterial infection. . . .[2]

App. 2-3, 18.

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1. Ellis misquotes the coverage provision at App. 18; *i.e.*, "all of the causes" should be "all other causes." The language is correctly quoted by the Court of Appeals in its opinion, App. 2.

2. Ellis misquotes the exclusionary provision as stating "caused by a resulting," rather than "caused by or resulting." The language is correctly quoted at App. 2-3.

Among its ERISA provisions, the policy stated:

> We are the fiduciary under the plan designated to review any claim appeals by claimant and are vested with discretionary authority to determine eligibility for benefits and to construe and interpret the plan/policy terms and provisions.

App. 3, 18.

On March 26, 1992, Mr. Ellis suffered a seizure while working at Lockheed. App. 6. During the seizure he fell, striking his head on a metal frame on the way down. App. 6. He died of his injuries later that day. App. 6. The death certificate stated that Mr. Ellis "fell during a seizure activity." App. 7. The death certificate and coroner's report indicated that Mr. Ellis's death was caused by "craniocerebral injuries due to fall due to seizure activity," with "contributory fatty changes of the liver." App. 7.

Ellis submitted a claim for benefits under the policy. App. 7. Transamerica denied the claim and affirmed its denial on appeal. App. 7. The claim was denied on the ground that the death was not within the scope of coverage, in that it did not "result[] directly and independently of all other causes from bodily injury caused by accident." The claim was denied on the further and alternative ground that Mr. Ellis's death proximately "resulted from [i]llness, disease, [or] bodily infirmity," in that the fall that gave rise to Mr. Ellis's fatal head injuries occurred during a seizure and as a proximate result of his seizure disorder. App. 7.

On cross-motions for summary judgment filed in the United States District Court for the Northern District of California, the court held that Transamerica did not abuse its discretion in denying the claim on the stated grounds and entered judgment

for Transamerica. App. 5-11. On appeal, the Ninth Circuit Court of Appeals, reviewing the grant of summary judgment *de novo*, affirmed the judgment, App. 1-4, and subsequently denied rehearing, App. 12.

Both of the courts below recognized that Transamerica potentially had a conflict of interest as claim fiduciary, in that it had a financial interest in the outcome of the claim decision. App. 2, 9-10. The Court of Appeals, in discussing the standard of review, cited *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), for the proposition that, "[i]f a plan administrator or fiduciary has a conflict of interest, that fact must be weighed in determining if there were an abuse of discretion." App. 2. However, the Court of Appeals held that the limiting provisions of the policy were conspicuous, plain, and clear, App. 3-4, and suggested that Transamerica's claim determination would have been correct even under a *de novo* standard of review:

> We hold that Transamerica did not abuse its discretion in construing this language to deny benefits. See *McClure v. Life Ins. Co.*, 84 F.3d 1129 (9th Cir. 1996) (holding under a *de novo* standard of review that identical exclusionary language would bar recovery of benefits if a preexisting condition contributed to the loss, even if the claimed injury was the predominant or proximate cause of the loss).

App. 3. Thus, by applying the "proximate cause" analysis favored by the California state courts, Transamerica actually applied a more stringent standard of review than that adopted by the Ninth Circuit in *McClure* as federal common law under ERISA.

Whatever differences may exist among the various circuits in applying the abuse of discretion standard of review to an allegedly conflicted claim fiduciary's decision, this case does not implicate such differences: Transamerica's claim decision was proper regardless of the standard of review applied. As this case does not raise any issue justifying this Court's review, the writ should be denied.[3]

REASONS FOR DENYING THE WRIT

I.

THE COURTS BELOW PROPERLY APPLIED THE ABUSE OF DISCRETION/ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 115, this Court held that a fiduciary's claim decision under ERISA is to be reviewed *de novo* "*unless* the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan." (Emphasis added.) If such discretion is given, then the "arbitrary and capricious" standard applies. *Id.*

In dictum, this Court stated in *Bruch* that, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, "that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of

3. Transamerica takes exception to Ellis's mischaracterizations of Transamerica's arguments to the courts below, *e.g.*, that these courts were "without authority to review and overturn TRANSAMERICA's all-prescient denial of the claim," App. 5, or that the discretion vested in Transamerica was "absolute," *id.* Transamerica never took any such position. As the opinions of both courts accurately summarize Transamerica's position on this and other issues, however, the arguments that Transamerica made in these courts need not be repeated here.

discretion.' " 489 U.S. at 115 (quoting Restatement (Second) of Trusts § 187 comment d (1959)).[4]

Hence, the abuse of discretion standard applies even when the fiduciary is operating under an actual conflict of interest; the conflict simply is weighed as a factor in the determination whether the fiduciary abused its discretion. Accordingly, the courts below appropriately applied the abuse of discretion/ arbitrary and capricious standard in reviewing Transamerica's claim determination.

II.

THE COURTS BELOW PROPERLY UPHELD TRANSAMERICA'S CLAIM DETERMINATION, REGARDLESS OF THE STANDARD APPLIED.

A. Mr. Ellis's Death Proximately Resulted From Non-Accidental Causes.

Ellis argues that there is a conflict within the Ninth Circuit, as well as among circuits, concerning the *way* in which the abuse of discretion standard is to be applied in a situation that actually or potentially involves a "conflicted fiduciary." *See Chambers v. Family Health Plan Corp.*, 100 F.3d at 825-26, and cases cited therein. Even assuming *arguendo* that these differences are of sufficient magnitude, and involve a sufficiently significant issue, to warrant this Court's attention under Rule 10 of the Rules of the Supreme Court ("Considerations Governing Review on

4. Most of the Courts of Appeals, including the Ninth Circuit Court, view the abuse of discretion standard as interchangeable with the arbitrary and capricious standard, referring to the distinction as one "without a difference." *See Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 n.1 (10th Cir. 1996), and cases cited therein; *Taft v. Equitable Life Assur. Soc'y*, 9 F.3d 1469, 1471 n.2 (9th Cir. 1993).

Certiorari"), the instant case does not implicate these variations: The outcome would have been the same even if a more stringent standard of review had been applied. *See* App. 3 and the Ninth Circuit Court's discussion of *McClure* in its Memorandum.

The undisputed facts presented to the courts below established that Mr. Ellis fell during and because of seizure activity, and that he died of the injuries incurred in the fall. Thus, there is no reasonable construction of the language under which Mr. Ellis's death could be considered a loss "resulting directly and independently of all other causes from bodily injuries caused by accident," App. 2, 18, and his death manifestly also was a "loss caused by or resulting from illness, disease, [or] bodily infirmity . . . ," App. 2-3, 18.

B. The Courts Were Required To Apply The Plain Language Of The Plan.

ERISA requires welfare benefit plans to be established and maintained pursuant to a written instrument. 29 U.S.C. §§ 1102(a)(1), 1102(b). The rights enforceable under 29 U.S.C. section 1132(a)(1)(B) are those provided "under the terms of the plan." To have found coverage for Mr. Ellis's death under provisions as explicit as Transamerica's insuring clause and disease exclusion, the courts below would have had to ignore them entirely. Instead, the courts would have had to apply a blanket rule that an "accident" anywhere in the chain of causation, whether or not the accident was the proximate cause of the loss, gives rise to an absolute obligation to pay benefits.

Nothing in the federal common law of ERISA requires or permits the courts to ignore the plain language of the plan and to substitute new substantive provisions uncontemplated by the plan administrator, the participants, or the insurer. As this Court has pointed out, "[ERISA] does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co. v.*

Commonwealth of Massachusetts, 471 U.S. 724, 732 (1985), citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983).

Further, and contrary to Ellis's arguments, even the "reasonable expectations" doctrine adopted by the Ninth Circuit in ERISA cases does not go so far. Only when the disputed policy terms are ambiguous or obscure does this doctrine permit the court to require that the coverage under a welfare benefit plan conform to the reasonable expectations of the participant. *See, e.g., Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382 (9th Cir. 1994). If the terms are plain, clear, and conspicuous, the language must be enforced as drafted. *See McClure v. Life Ins. Co. of North America*, 84 F.3d at 1136. As the Ninth Circuit pointed out in its memorandum decision in the instant case, the Transamerica policy satisfied all of these terms. The language was enforceable as written.

C. The Circuit Courts Have Enforced Policy Language Similar To Transamerica's.

Cases decided under ERISA have enforced policy language similar to Transamerica's as the courts below construed it.

In *McClure v. Life Insurance Co. of North America*, 84 F.3d at 1135, the court considered whether an insured was entitled to recover under an accidental disability policy governed by ERISA. The alleged disability had arisen when the insured tripped over a guide wire, exacerbating a preexisting back condition. The parties stipulated that the fall was the proximate cause of the total disability. *Id.* at 1133. The insurer argued that the insured could not recover because his disability did not result "directly and independently of all other causes from bodily injuries caused by accident," inasmuch as his preexisting back condition contributed to his disability.

Upon evaluating the claim denial under the *de novo* standard of review, the court held:

> [I]f the exclusionary language here in question is conspicuous it would bar recovery if a preexisting condition substantially contributed to the disability. This could result in a denial of recovery even though the claimed injury was the predominant or proximate cause of the disability. On the other hand, we hold that if the language is inconspicuous, a policy holder reasonably would expect coverage if the accident were the predominant or proximate cause of the disability.

Id. at 1136.

The Ninth Circuit panel found Transamerica's policy language to be conspicuous. Moreover, unlike the policy at issue in *McClure*, the Transamerica policy contains an exclusion for loss resulting from disease or bodily infirmity. Such a provision would have provided an alternative basis for the court's decision in *McClure*.

In formulating its approach to the application of the insuring provisions of the accidental death policy before it, the Ninth Circuit in *McClure* adopted the analysis formulated by the Fourth Circuit:

> The application of the Fourth Circuit test "requires a two-pronged analysis, namely: (1) whether there is a pre-existing disease, pre-disposition, or susceptibility to injury; and (2) whether this pre-existing

> condition, pre-disposition, or susceptibility substantially contributed to the disability or loss."

McClure, 84 F.3d at 1135, quoting *Quisenberry v. Life Ins. Co. of N. America*, 987 F.2d 1017, 1032 (4th Cir. 1992) (en banc). Under the Fourth and Ninth Circuit analyses, there can be no doubt that a seizure that caused a fall "substantially contributed" to the loss.

In *Winchester v. Prudential Life Insurance Co. of America*, 975 F.2d 1479 (10th Cir. 1992), the court of appeals upheld the denial of a claim for accidental death benefits because the beneficiary failed to prove, as required under ERISA and under the federal law of summary judgments, that the participant's death from heart failure following a firefighting exercise resulted from accident "directly and independently of all other causes," including pre-existing heart disease. *Id.* at 1487-88, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Ellis similarly failed to prove that Mr. Ellis's death was an event within the contemplation of the insuring clause, and that the loss resulted from accident directly and independently of his seizure activity.

Ellis's petition suggests that the approach taken by the courts below in this matter was somehow aberrant. As illustrated by the cited cases, it was not. On the facts presented, the affirmance of the judgment in favor of Transamerica was inevitable regardless of the standard of review applied.

III.

ELLIS'S "DUE PROCESS" ARGUMENT IS UNSUPPORTED.

Ellis contends that she was denied due process by the alleged unfairness of the claim review process and by the standard of

review applied by the courts in evaluating the claim determination. Ellis's contentions are not supported either factually or legally in her petition, nor were they supported in the courts below. This issue is not properly before this court.

CONCLUSION

Ellis's petition fails to present any basis for this Court's grant of review. Her dissatisfaction with the scope of the coverage offered under the policy under which Mr. Ellis was insured is not a matter that justifies this Court's attention. Transamerica respectfully requests that the petition be denied.

Respectfully submitted,

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